

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AL LADELL CARTER,

Defendant-Appellant.

UNPUBLISHED

September 25, 2007

No. 268806

Wayne Circuit Court

LC No. 05-008806-01

Before: Schuette, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1), and sentenced to three years' probation with the first six months in jail. He appeals as of right. We affirm.

Defendant's conviction arises out of the sexual assault of his girlfriend's sister, the complainant, while she was living with defendant and his girlfriend. According to the complainant, while her sister was at work, defendant pushed her onto her bed, pulled her pants and underwear down to her knees, and attempted to pull her shirt up. She repeatedly told him to stop, but he told her to "shut up" and held her down. She also hit and kicked him in an attempt to fend off his attack. He eventually stopped and left the room without engaging in sexual penetration with the complainant. Defendant's defense focused on the lack of corroborating evidence and the complainant's longstanding hostility toward defendant. The jury convicted defendant as charged.

Defendant first argues that the trial court abused its discretion by denying his motion for a mistrial based on the alleged inability of two jurors to act impartially. We disagree. "We review for an abuse of discretion a trial court's decision on a motion for a mistrial." *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). A motion for a mistrial should be granted "only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id.* at 195, quoting *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999). Thus, absent a showing of prejudice, reversal is not warranted. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999).

In *People v Daoust*, 228 Mich App 1, 7-8; 577 NW2d 179 (1998), this Court acknowledged that it had previously held that

when information potentially affecting a juror's ability to act impartially is discovered after the jury has been sworn, and the juror is allowed to remain on the jury, the defendant is entitled to relief on appeal if it can be established either (1) that the juror's presence on the jury resulted in actual prejudice, (2) that the defendant could have successfully challenged the juror for cause, or (3) that the defendant would have "otherwise dismissed" the juror by exercising a peremptory challenge had the information been revealed before trial.

In *Daoust*, *supra* at 9, however, this Court stated that the "otherwise dismissed" language of the third prong of the test is not based on a defendant's right to an impartial jury and raises practical concerns regarding the ability to determine in hindsight whether a defendant would have elected to exercise a peremptory challenge. Thus, the *Daoust* Court limited the test to the first two prongs enumerated above. Accordingly, defendant in the instant case "is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror[s] in question or (2) that the juror[s] [were] properly excusable for cause." *Id.*¹

Defendant fails to establish that he was actually prejudiced by the presence of the two jurors in question on the jury panel. During deliberations, the jury submitted a note to the trial court stating as follows: "We have discovered that two jurors have had previous personal experiences similar to these charges. How should we proceed?" In response, the trial court instructed the jurors that they could not rely on personal experiences in deciding the case and must rely only on the evidence presented. The trial court then questioned the jurors as follows:

So, I guess a fundamental question I have to you is, and whoever these jurors are, can you set aside these personal experiences and decide the case based on the evidence that you see and hear in this courtroom? Your personal experiences you cannot use those to decide this case because these experiences were not evidence. So, I guess the threshold question is can everyone follow those instructions to decide this case on the evidence that came into this trial and not based on any personal experiences?

The jurors responded affirmatively to the trial court's inquiry and resumed deliberations. Thus, because the jurors indicated that they were able to disregard their personal experiences and

¹ Defendant seemingly relies on *People v Manser*, 250 Mich App 21; 645 NW2d 65 (2002), as resurrecting the "otherwise dismissed" prong of the test for determining whether a defendant is entitled to relief when a juror's inability to act impartially is discovered after the jury has been sworn. Defendant argues that he has established this prong because the record clearly shows that he would have exercised peremptory challenges had the jurors' alleged bias been discovered before the jury was sworn. *Manser*, however, did not resurrect the "otherwise dismissed" prong. Rather, the *Manser* Court acknowledged *Daoust*'s holding restricting the test to the first two prongs, but distinguished *Daoust* based on numerous differences between the two cases. *Manser*, *supra* at 27-30. Significantly, although the *Manser* Court stated that it did not share the *Daoust* Court's concerns regarding determining in hindsight whether a peremptory challenge would have been exercised, the *Manser* Court also limited this holding to the facts and circumstances of that case, *id.* at 29, which differ considerably from those of the instant case.

decide the case based on the evidence presented, defendant cannot show that he was actually prejudiced by the presence of the two jurors on the panel. Defendant's argument that the two jurors were unable to act impartially is therefore unfounded.

Defendant has also failed to show that the jurors were properly excusable for cause. A potential juror is properly excusable for cause if the juror is "biased" such that "the juror has preconceived opinions or prejudices, or such other interest or limitations as would impair his or her capacity to render a fair and impartial verdict." *People v Eccles*, 260 Mich App 379, 382; 677 NW2d 76 (2004). As previously discussed, the jurors indicated their ability to set aside their previous experiences and decide the case based on the evidence presented.

Further, defendant has not established that the jurors were excusable for cause under MCR 2.511(D)(12), formerly MCR 2.511(D)(13), which provides that a prospective juror may be challenged for cause if the person "is interested in a question like the issue to be tried." Regarding this provision, this Court stated in *People v Manser*, 250 Mich App 21, 28 n 5; 645 NW2d 65 (2002), that the prosecutor likely would not have been successful in arguing against the dismissal for cause of the juror at issue. There, this Court opined that "[b]eing victimized by sexual misconduct carries a psychological effect that would certainly qualify as such an interest in the issue to be determined in a criminal sexual conduct trial." *Id.* In the instant case, the jury's note to the trial court stated only that two jurors had had "previous personal experiences" similar to the charges in the instant case. Consequently, unlike in *Manser*, it is unclear from the record before us whether that the two jurors in question themselves were the victims of sexual misconduct. Further, although being interested in a similar issue presents grounds for a party to raise a challenge for cause under MCR 2.511(D)(12), ultimately the decision whether to grant or deny the motion rests on the trial court deciding whether the juror's ability to decide the case fairly and impartially is affected by that interest. See *People v Legrone*, 205 Mich App 77, 81-82; 517 NW2d 270 (1994). Here, the jurors, when asked that question in the specific context of their "similar personal experiences," responded that they could be fair and impartial. Therefore, under the circumstances presented in this case, defendant has not established that the jurors were excusable for cause under MCR 2.511(D)(12).

Lastly, defendant contends that the trial court erred by failing to hold a hearing regarding the jurors' alleged impartiality. Because defendant did not preserve this issue by requesting a hearing below, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *Id.* at 763, 774; *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

Defendant has not shown that the trial court's failure to hold a hearing constituted plain error considering that the jurors indicated that they were able to disregard their previous experiences and decide the case based on the evidence presented. Because there is no indication that the jurors were unable to act impartially, the trial court did not err by failing to sua sponte hold a hearing.

Affirmed.

/s/ Bill Schuette
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter